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No.

In The

Supreme Court of the United States

October Term, 1996

LISA ANNE VARNER,

Cross-Petitioner,

vs.

NATIONAL SUPER MARKETS, INC.,

Cross-Respondent.

Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In order to submit the issue of punitive damages to the jury, is a Title VII claimant required to produce more evidence than is sufficient to establish an intentional violation of protected civil rights. The Eighth Circuit Court of Appeals in the case below so held. The Eighth Circuit's position conflicts with that of the position of the Court of Appeals for the District of Columbia announced in *Barbour v. Merrill*, 48 F.3d 1270 (D.C. Cir. 1995), *cert. granted*, No. 95-27, 116 S. Ct. 805, *cert. dismissed*, 116 S. Ct. 1037 (1996).

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The opinion of the United States Court of Appeals for the Eighth Circuit entered on September 9, 1996 is reprinted in the Appendix 1a-11a to the Petition for Writ of Certiorari (hereinafter referred to as "Pet. App.") filed by National Supermarkets, Inc., Docket No. 96-802 and reported as 94 F.3d 1209 (8th Cir. 1996). The portion of the trial transcript reflecting the decision of the district court to deny submission of the issue of punitive damages to the jury is reprinted in the attached Appendix.

STATEMENT OF JURISDICTION

The Conditional Cross-Petition for Writ of Certiorari seeks review of that part of the Judgment of the Court of Appeals for the Eighth Circuit filed on September 9, 1996 which found that the United States District Court for the Eastern District of Missouri did not err in refusing to submit a punitive damages instruction to the jury.

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) in that this Petition seeks review of a final judgment rendered in a civil case by the United States Court of Appeals for the Eighth Circuit. Jurisdiction is also predicated upon Rule 12.3 of the Rules of the Supreme Court of the United States and is conditional upon this Court's grant of the Petition for Writ of Certiorari. Federal jurisdiction in the United States District Court was originally invoked under Title 42 U.S.C. § 2000e-5 and Title 28 U.S.C. §§ 1331, 1443, 1441(b) and 1441(c).

STATUTORY PROVISION INVOLVED

Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(1), provides in pertinent part:

> A complaining party may recover punitive damages . . . if [she] demonstrates that the respondent engaged in a discriminatory practice . . . with malice or with reckless indifference to federally protected rights of an aggrieved individual.

STATEMENT OF THE CASE

A. Facts

Over a period of several weeks in the Spring of 1991, Robert Paul Edmiston ("Edmiston") a fifty-one year old produce clerk employed at Petitioner National Supermarkets, Inc.'s ("National") Sierra Vista Store, made four sexual comments and displayed pornography to Respondent/Conditional Cross-Petitioner Lisa Anne Varner ("Varner"), then age 17. In late July, 1991, toward the end of Varner's shift, Varner was wrapping a fruit basket when Edmiston approached her from behind and reached through her arms and squeezed Varner's breasts. After completing the remainder of her shift Varner went home and called her boyfriend and co-worker at National, Christopher Pilch ("Pilch"). Immediately after talking to Varner, Pilch called Curtis Mason, the store manager at National's Sierra Vista Store. According to Pilch's testimony, he told Mason that Edmiston had grabbed Varner's breasts. Pilch testified Mason replied that "Varner had to report the incident to him and that he could say something to Edmiston and it might get worse or he could do nothing and maybe Edmiston would forget about it."

Mason, however, testified that Pilch reported an "off-color remark" and that Mason told Pilch to tell Varner to contact Roger Beckman in Human Resources.

On November 22, 1991, Varner was sitting on a produce truck in the Sierra Vista Produce Room when Edmiston again

approached her from behind, forced his arms through Varner's arms and squeezed her breasts. Edmiston then pulled Varner's arms behind her back and pushed them into his crotch area, warning her "not to move around too much or she might feel something she doesn't want to touch". Varner broke free and ran from the room. She encountered co-worker Patrick McCorkle ("McCorkle"), and told him what happened. McCorkle asked her if she had told Mason. McCorkle testified he confronted Edmiston the next day who acknowledged he was in trouble. She then went home, informed her mother of the incident and again called Pilch. Pilch immediately called Mason and reported the incident. Pilch testified Mason replied in the same fashion as before but added "That's just Bob being himself." Mason, admitted that Pilch reported the physical assault as above described, but testified he told Pilch to tell Varner to report it to Roger Beckman in Human Resources.

Varner told her father about the November 22, 1991 incident who then reported the incident to the St. Louis County Police. The police requested that Varner call Edmiston. The phone call was taped. Thereafter, on November 23, 1991, the police arrested Edmiston and took statements from Mason, Pilch and McCorkle.

Detective Ventimiglia of the St. Louis County Police testified regarding the police involvement and Mason's statements. According to Ventimiglia, Mason had indicated the "late" July incident, as well as the November 22, 1991 incident, had involved sexual abuse. According to Ventimiglia, Mason indicated that Pilch had called him on two occasions but there was nothing he could do unless Varner reported the incidents to him.

Barbara Bost, an employee at National's Sierra Vista Store testified that several years before the incidents involving Varner, Edmiston had similarly physically assaulted her. Barbara Bost

testified she told no one about the incident until after Edmiston's arrest in this case when she told Pilch and one of the union shop stewards. Barbara Bost testified she was aware National had a sexual harassment policy even at the time of Edmiston's assault upon her.

It is and was undisputed that Mason had supervisory authority as store manager. Mason had the authority to issue verbal and written warnings, suspend and in some cases terminate employees.

It is also undisputed that Mason did not ever discuss the claims with Varner, although he believed Varner was uncomfortable discussing the incidents with him. Mason did not confront Edmiston at any time nor did he inform anyone of Pilch's telephone calls until after Edmiston's arrest at which time he informed his district manager, his assistant store manager and a few days later, Roger Beckman in National's Human Resources Department.

National had a sexual harassment policy. (Pet. App. 67a-70a). The version in effect during the relevant time period required an employee who believed that he or she had been sexually harassed to promptly report the incident to Carol Schone of the Training Department or Roger Beckman of Human Resources. (Pet. App. 67a-68a). This portion of the policy contained the instruction "Please Post." Under National's Procedures for Handling a Sexual Harassment Claim, a supervisor who is notified of a complaint regarding sexual harassment was to immediately direct the complainant to Carol Schone or Roger Beckman. The procedure contained the instruction "Do NOT Post". Mason admitted at trial that under the policy, he, as a store manager, could not take any action upon receipt of a complaint of sexual harassment. Kevin Beckerle, National's Director of Labor Relations who drafted

the policy testified that they do not want "[their] managers going and investigating complaints that may be made."

There was a dispute in the evidence as to whether National's sexual harassment was posted and if posted whether it was placed in a binder along with numerous policies or placed on a bulletin board along with OSHA policies, wedding invitations, "thank you" notes and union information.

Varner received an Employee Handbook on the date of her hire. Varner agreed, when shown a copy of that Handbook on cross examination at trial, that it contained a reference to the sexual harassment policy. Varner denied ever seeing or reading the sexual harassment policy before her deposition in this case.

National never sponsored meetings or seminars concerning sexual harassment for the nonsupervisory employees. According to Mason, he and the store managers had attended a seminar in which the issue of sexual harassment was one of several topics discussed. Mason never held employee meetings concerning the sexual harassment policy or sexual harassment in general.

B. District Court's Ruling on the Punitive Damages Instruction.

Varner submitted a proposed jury instruction on the issue of punitive damages. The Proposed Instruction is included in the attached Appendix. The district court stated it "did not think the evidence in this case was sufficient to support" submission of the punitive damages claim to the jury and refused the instruction. The district court's oral ruling is set forth in the portion of the trial transcript included in the attached Appendix.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

I.

THERE IS A CONFLICT BETWEEN THE DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEALS AND THE EIGHTH CIRCUIT COURT OF APPEALS CONCERNING THE APPROPRIATE EVIDENTIARY STANDARD FOR SUBMISSION OF THE ISSUE OF PUNITIVE DAMAGES TO THE JURY UNDER TITLE VII.

The United States Courts of Appeals for the District of Columbia and Eighth Circuits have rendered conflicting decisions as to the required evidentiary showing a Title VII claimant must meet for submission of the issue of punitive damages to the jury. Should this Court grant certiorari in this case, this Court should grant certiorari as to the conditional Cross-Petition to resolve the conflict because of the importance of the question and because if unresolved, the various circuits would render conflicting and inconsistent opinions on this issue, thereby hindering the deterrent purposes of the 1991 Civil Rights Act.

A. The Conflict Between the District of Columbia and Eighth Circuit Court of Appeals.

The Eighth Circuit in its opinion in this case stated "to collect punitive damages under the Civil Rights Act of 1991, Varner must show National engaged in discrimination "with malice and reckless indifference to [her] federally protected rights." (Pet. App. 10a, *citing* 42 U.S.C. § 1981a(b)(1)).

The Eighth Circuit in the case below rather summarily found that Varner made no showing that National acted with malice or

deliberate indifference or that its conduct was outrageous. (Pet. App. 10a-11a). Accordingly, the Eighth Circuit found that the District Court did not err in failing to instruct the jury on the issue of punitive damages. (Pet. App. 11a). In making this finding the Eighth Circuit referred briefly to the Sixth Circuit's opinion in *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1216 (6th Cir. 1996) (duplicative action of employees insufficient to support punitive damages award under Civil Rights Act of 1991). The Eighth Circuit also referred to a footnote in *Pandazides v. Virginia Bd. of Education*, 13 F.3d 823, 830 n. 9 (4th Cir. 1994) for the proposition that "a showing of more than intentional discrimination is required to recover punitive damages under Civil Rights Act of 1991." (Pet. App. 10a-11a).

In *Barbour v. Merrill*, 48 F.3d 1270 (D.C. 1995), Barbour, an African American, brought action against Medlantic Management Corporation and Mark Merrill for violating his rights under 42 U.S.C. § 1981 by refusing to hire him because of his race. The jury found in favor of Barbour and awarded actual and punitive damages. The District of Columbia Circuit upheld the jury award of punitive damages. In so doing, the District of Columbia noted that under § 1981 as well as in § 1983 actions, punitive damages are proper "only on a showing of evil motive or intent, or . . . reckless indifference to the federally protected rights of others." 48 F.3d at 1277. The court construed the Supreme Court opinion of *Smith v. Wade* to hold that "evidence that suffices to establish an intentional violation of protected civil rights may suffice to permit the jury to award punitive damages provided the jury in its 'discretionary moral judgment' finds that the conduct merits a punitive award. No additional evidence is required." 48 F.3d at 1277, *citing Smith v. Wade*, 461 U.S. 30, 52, 103 S. Ct. 1625, 1638, 75 L. Ed. 2d 632 (1983) and *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 205-06 (1st Cir. 1987). The District of Columbia Circuit Court concluded that the jury's finding of intentional racial

discrimination permitted the jury to find the "evil motive or intent, or . . . reckless or callous indifference" required to award punitive damages. 48 F.3d at 1277.

The required showing for the recovery of punitive damages under the Civil Rights Act of 1991, codified at 42 U.S.C. § 1981(b)(1), is the same as required by the courts under either 42 U.S.C. § 1981 or 42 U.S.C. § 1983. Therefore, the position taken by the District of Columbia Circuit Court of Appeals in *Barbour* creates a conflict with the Eighth Circuit's opinion on the issue of the requisite evidentiary standard for the recovery of punitive damages in civil rights cases.

II.

THIS COURT GRANTED CERTIORARI ON THIS ISSUE IN THE CASE OF *BARBOUR V. MERRILL* BUT CERTIORARI WAS DISMISSED PURSUANT TO RULE 46.1 OF THE SUPREME COURT RULES. ACCORDINGLY, THIS CASE PRESENTS THIS COURT THE OPPORTUNITY TO CONSIDER THIS IMPORTANT ISSUE.

Mark Merrill and Medlantic Management Corporation filed a Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. Petitioners raised two Questions Presented. The second question states: "[w]hether *Smith v. Wade*, 461 U.S. 30 (1983), permits an award in every case under 42 U.S.C. §1981 in which there is a finding of intentional discrimination." The Petition for Writ of Certiorari was granted as to the Petitioner's second Question Presented. *Barbour v. Merrill*, __ U.S. __, 116 S. Ct. 805 (1996). Thereafter, certiorari was dismissed pursuant to Rule 46.1 of the United States Supreme Court Rules. 116 S. Ct. 1037 (1996). Because the issue raised in the instant case is very similar to the one presented in *Barbour*, this Court may wish to grant certiorari to consider this important issue.

III.

CONGRESS, IN THE CIVIL RIGHTS ACT OF 1991 FOR THE FIRST TIME MADE AVAILABLE TO TITLE VII CLAIMANTS THE RIGHTS TO RECOVERY OF PUNITIVE DAMAGES AND THE RIGHT TO A JURY TRIAL, THUS EVIDENCING THE NEED FOR STRONGER MEASURES OF DETERRENCE. THEREFORE, THIS COURT SHOULD CLARIFY WHAT EVIDENTIARY STANDARD IS REQUIRED TO SUBMIT THE ISSUE OF PUNITIVE DAMAGES TO THE JURY FOR ITS CONSIDERATION IN LIGHT OF THE CONFLICTING EVIDENTIARY STANDARDS ANNOUNCED BY THE VARIOUS CIRCUITS.

The House Committee on Education and Labor when passing upon the proposed Civil Rights Act stated that "[s]trengthening Title VII's remedial scheme to provide monetary damages for intentional gender and religious discrimination is necessary . . . to encourage citizens to act as private attorney generals to enforce the statute. Monetary damages simply raise the cost of an employer's engaging in intentional discrimination, thereby providing employers with additional incentives to prevent intentional discrimination before it happens." H.R. Rep. No. 40(I) 102d Cong. 1st Sess. 64-65 (1991) (*reprinted in* 1991 U.S.C.C.A.N. 549, 602-603).

The House Committee explained "Punitive damages would also be available where the Respondent . . . engaged in an unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others. This language sets the same standard courts have applied under Section 1981. *See e.g. Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 205 (1st Cir. 1987); *Beauford v. Sisters of Mercy-Province of Detroit, Inc.*, 816 F.2d 1104, 1108-1109 (6th Cir.

1987), *cert. denied*, 484 U.S. 913, 108 S. Ct. 259 (1987); *see also Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983) (construing 42 U.S.C. Sec. 1983)". H.R. Rep. No. 40(I) 102d Cong., 1st Sess. 74 (1991) (*reprinted in* 1991 U.S.C.C.A.N. 549, 612).

This Court in *Smith v. Wade*, suggested that a threshold for punitive damages higher than the underlying standard for liability is not required in cases of intentional wrongdoing. 461 U.S. 30, 51, 103 S. Ct. 1625, 1637-1638, 75 L. Ed. 2d 632 (1983).

The First Circuit Court of Appeals in *Rowlett v. Anheuser-Busch, Inc.*, in reliance upon *Smith v. Wade's* explained that punitive damages are recoverable when there is malice, reckless or callous indifference to the federally protected rights and stated:

> [a]s some courts have recognized, this standard means that, in jurisdictions where punitive damages are authorized, punitive damages are within the jury's discretion in cases requiring proof of intentional wrong doing. (cites omitted) In such cases, the state of mind necessary to trigger liability for the wrong is at least as culpable as that required to make punitive damages applicable. That does not mean that punitive damages are appropriate in every case, but rather that in each case the trier of fact has the discretion to determine whether punitive damages are necessary.

832 F.2d at 194, 205-206 (1st Cir. 1987). The First Circuit, therefore, rejected Anheuser Busch's argument that something more than intentional discrimination was necessary to submit punitive damages to the jury.

The Court in *Barbour v. Merrill* relied on *Smith v. Wade* and *Rowlett* in reaching the conclusion that evidence sufficient to establish an intentional violation of protected civil rights is sufficient to permit the jury to award punitive damages. 48 F.3d 1270, 1277 (D.C. Cir. 1995).

As shown above, the House Committee made express reference to both this Court's opinion in *Smith v. Wade* and the *Rowlett* case. Such reference can be seen as acceptance of the findings in those cases that no additional evidentiary showing is required beyond that necessary to establish the civil rights violation in order to submit the issue of punitive damages to the jury.

Further, the First Circuit in *Rowlett* and the District of Columbia Circuit in *Barbour* indicate that the issue of punitive damages must be submitted to the jury in cases involving proof of intentioned wrong doing. *Barbour v. Merrill,* 48 F.3d 1270, 1277 (D.C. Cir. 1995), *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 205-06 (1st Cir. 1987). These decisions are at odds with the Eighth Circuit's determination that the trial court did not err in failing to submit the issue of punitive damages to the jury in this case because a showing of something more than necessary to establish the underlying claim was required and Varner failed to make such a showing. (Pet. App. 10a-11a). The decisions in *Smith v. Wade, Barbour* and *Rowlett* also conflict with the cases cited by the Eighth Circuit in reaching its conclusion in this case. In *Pandazides v. Virginia Board of Education,* 13 F.3d 823, 831 n. 9 (4th Cir. 1994), the court stated a "heightened showing of discriminatory action is required to recover punitive damages under the Civil Rights Act of 1991." Likewise *Beauford v. Sisters of Mercy-Province of Detroit,* conflicts with *Barbour, Merrill* and *Smith v. Wade* because the Court indicated that although plaintiff presented sufficient evidence of intentional discrimination, no testimony was adduced evidencing the requisite malice, or reckless or callous indifference to support a

jury verdict imposing punitive damages. 816 F.2d 1104, 1109 (6th Cir. 1987), *cert. denied,* 484 U.S. 913, 108 S. Ct. 259 (1987).

Finally, the evidence in this case demonstrates the appropriateness of allowing the submission of the issue of punitive damages to the jury for its determination as to whether they are warranted.

There was the undisputed fact that National's supervisory employee, Mason, was informed of two instances of sexual harassment of Varner but did nothing, despite knowledge that sexual harassment was purportedly not tolerated by National. In fact, the evidence reveals Mason told Pilch to tell Varner that he couldn't do anything unless she reported it to him and if he did something it could get worse. Mason's statements to Pilch were made with knowledge of National's sexual harassment policy which required the supervisor to advise the complainant to report the incidents to Roger Beckman or Carol Schone of the Human Relations Department.

Thus, Mason knowingly violated the policy by telling Pilch, Varner had to report it to him, when he knew he was not empowered by the policy to do anything. Mason also knowingly violated the policy by failing to inform Pilch or Varner to contact Human Resources. Consequently, Mason knowingly prevented Varner from obtaining relief from Edmiston's harassment under National's policy, to the extent such relief was available.

Furthermore, Mason's response to Pilch's second report of harassment of Varner was to the effect "that's just Bob being himself." Thus, indicating that Edmiston's conduct of sexual harassment and assault was acceptable behavior, when Mason knew it was not.

Mason's response to Pilch that "he could say something to

Edmiston and it could get worse or do nothing and maybe Edmiston would forget about it" basically indicated to Pilch and Varner that there was not anything that could be done to stop the harassment. Moreover, Mason testified he was aware Varner was uncomfortable talking to him about the matter but did not try to get assistance to handle the matter. Mason's behavior as National's agent or supervisory personnel certainly demonstrates reckless indifference to Varner's rights justifying the submission of punitive damages to the jury.

Secondly, National's policy of sexual harassment is in violation of the law for it prohibits its supervisory personnel from taking any action to stop sexual harassment. Moreover, the portion of the policy indicating that the supervisors had only the authority to direct the complainant to Human Resources, was not posted, thus, National did not inform its employees that their store manager and other supervisors were not appropriate persons to report matters of sexual harassment. Further, although the sexual harassment policy was to be posted, Varner and Pilch said they never saw it posted. The other witnesses conflicted as to where and how the policy was posted. This evidence suggests the policy was either not posted or not prominently displayed. Further, National had no seminars for its nonsupervisory employees on sexual harassment, nor did it have seminars solely devoted to sexual harassment for its managers or assistant managers. Thus, the evidence demonstrates not only that National violated Varner's Title VII rights but was recklessly indifferent to her Title VII rights.

Varner understands, however that the decision of whether to award punitive damages falls within the discretion of the jury. Varner contends that the issue should have been submitted to the jury for its consideration. The standard announced by the District of Columbia Circuit and the First Circuit would have required the submission of the issue of punitive damages to the jury in this case.

CONCLUSION

The Court should grant Respondent's Conditional Cross-Petition for Writ of Certiorari to resolve the conflict between the circuits as to the appropriate evidentiary standard for the submission of the issue of punitive damages to the jury in an action brought pursuant to 42 U.S.C. § 2000e-2000e-17 and 42 U.S.C. § 1981a.

Respectfully submitted,

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APPENDIX A — JURY INSTRUCTION

INSTRUCTION NO. 7

If you find the issues in favor of the Plaintiff under the Federal Civil Rights Act, and if you believe the conduct of the defendant as submitted in Instruction Number __ was outrageous because of defendant's evil motive or reckless indifference to the rights of others, then in addition to any damages to which you find Plaintiff entitled under Instruction No. __, you may award Plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct.

APPENDIX B — EXCERPTED TRANSCRIPT OF PROCEEDINGS DATED JUNE 23, 1995

[Commencing at page 875]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:93CV663JCH

VOLUME V
June 23, 1995

LISA ANNE VARNER,

Plaintiff,

vs.

NATIONAL SUPER MARKETS,

Defendant.

PRESENT:	Honorable Jean C. Hamilton District Judge, Presiding
FOR THE PLAINTIFF:	Mr. Robert D. Blitz Ms. Ellen W. Dunne 120 S. Central, 10th Floor St. Louis, MO 63105
FOR THE DEFENDANT:	Ms. Ann Marie Piana 6050 North Lindbergh Hazelwood, MO 63042

Appendix B

(This cause coming on for jury trial on June 19 - 23, 1995 and the following proceedings were then had, to-wit:)

* * *

[926] other cases including *Caleshu vs. Merrill, Lynch, Pierce, Fenner & Smith.* I think it is an appropriate instruction to indicate to the jury that, to define what the terms and conditions and privileges of employment are and that it can include things other than the typical thought of wages and salary, and for those reasons, I think it accurately states the law and that would have been an appropriate instruction to submit.

MS. PIANA: With regard to that instruction, it unreasonably sets out that particular element of damages. It's not a complete statement of what is contained in the cases that are cited, as far as term, condition and privilege of employment. I agree that term, condition, privilege of employment should be defined in the instructions. However, I do not believe that that instruction appropriately reflects that definition.

THE COURT: I'll mark this refused instruction E. Any others?

MS. DUNNE: I would like to submit just for the record what I have marked as plaintiff's submitted instructions 27 and 27 A which are the punitive damages instructions under the Federal Civil Rights and the Missouri Civil Rights Act, and in support of, these are based actually on the M.A.I. approved instruction 10.01 and they are verbatim of those instructions and I thought they would be appropriate, [927] even though one would be used for a federal civil rights claim because it is similar to proposed instruction of the Devitt & Blackmar.

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In addition, I think there was sufficient evidence to submit to the jury the issue of punitive damages, particularly the evidence of Chris Pilch's testimony concerning what Curt Mason testified as Bob acting up again, and further, the testimony concerning the failure to respond in any way by talking to any other employees, to Lisa or to Robert Edmiston concerning the incidents, and further, because of the statements by three of the management level employees that they, that the management employees can use common sense in remedying this situation and they failed to do so in this case.

THE COURT: Any response? You have the instruction but I guess this is the time to go into the issue of punitive, damages.

MS. PIANA: With regard to the punitive damages element, the evidence introduced at trial did not rise to the level of introducing punitive damages. The plaintiff testified and Chris Pilch testified that when Curt Mason was allegedly notified of an incident occurring on or about July of 1991, that they were directed to call, they were directed to report the incident or that the plaintiff needed to come to Curt Mason. She did not do that. Curt Mason gave her a [928] reasonable instruction. His conduct does not rise to the level of being outrageous, depending upon which Court, which jurisdiction we're in under the instructions, does not rise to the level of being outrageous, evil motive, malicious or with reckless disregard for the plaintiff's rights.

The plaintiff never responded to that directive to report the incident to him. There was in existence a sexual harassment policy which the plaintiff did receive and admitted to having received in her employee handbook. That contains procedures of sexual harassment policy, which tells the plaintiff to contact Human Resources.

Appendix B

There is also in existence a written sexual harassment policy which was posted, which also provided procedures for reporting incidents of sexual harassment. There wasn't any evidence introduced at trial other than this particular testimony concerning any allegation of purported claim for punitive damages. And essentially this evidence does not rise to the level to allow the Court to submit the issue of punitive damages to the jury.

THE COURT: Anything further?

MS. DUNNE: That's all for us. Thank you.

THE COURT: We had had an extensive discussion last night off the record about the punitive damage submission and I indicated that I didn't think the evidence in this case was sufficient to support such a submission. Obviously these are [929] instructions that would have been offered, had I not ruled in that way.

So consistent with my ruling that I didn't think punitive damages were merited here, a submission on punitive damages, I'll mark these as refused instructions F and G.

MS. PIANA: Further just for the record, Judge, can I incorporate my filed objections to those instructions?

THE COURT: Sure. And refused instruction F will be the instruction with respect to the federal act, and refused instruction G will be the refused instruction with respect to the Missouri Human Rights Act. Okay anything else, Ms. Dunne?

MS. DUNNE: No, that's all for us.

Appendix B

THE COURT: Ms. Piana?

MS. PIANA: What I would like to do is submit an alternative verdict director under the Missouri Human Rights Act. Now I should — let me give you this one. This has the citation, the Missouri Human Rights Act and then an alternative verdict director under the federal Civil Rights Act and I failed to identify it. It's 21 A and 21 B, both submitted instructions, and I believe that these instructions are mimiced after the form that's contained in Devitt & Blackmar & Wolff, although the format in here, I have added the term that the conduct in paragraph second was pervasive or regular. This does not allow the jury to speculate as to the . . .